IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7426 OF 2005

Sudhakar Haribhau Chavan Petitioner

versus

Raghunath Maruti Chavan since deceased through LRs and ors. Respondents

Mr.R.S.Deshpande for petitioner.

Mr.Vikas Potghan for respondents 1c, 1d and 1g.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 23rd January 2006

PC :

1. Heard Shri Deshpande for the petitioner and respondents represented by Shri Vikas Potghan. Rule. Returnable forthwith by consent. Shri Potghan waives service.

2. Shri Deshpande submits that the suit properties are described in the decree of the Trial Court which is at Exhibit-B, Page 17 and the Schedule of Property is at Page 18. There were some structures on the suit property and the decree passed by the Lower Appellate Court, which

is confirmed right up to the Hon'ble Supreme Court, directs the defendants to the suit to withdraw themselves from encroachment, failing which the petitioners were at liberty to remove the encroached portion in accordance with law.

3. The encroached portion was directed to be removed on an application by the petitioner in Regular Darkhast No.14 of 2002. The respondents 1-c and 1-d indeed removed themselves but stated that there are some utensils and household articles belonging to them which may be allowed to be kept over night and next day they undertake to remove the same. However, the petitioner noticed that instead of the utensils and articles being removed, the same were purported to be stored in a tin shed which was erected over night. Therefore, they moved the Trial Court for removal of that encroachment subject of course to the respondent nos.1c and 1d taking away their articles and utensils. That application (Exhibit-60) is rejected by the impugned order.

4. Shri Deshpande also brings to my notice an application (Exhibit-72) which is preferred by the respondents for dismissing the Execution Proceedings and in that behalf he states that

paragraph no.4 of the order is relevant.

5. Shri Potghan appearing for respondents could not dispute the fact that Application Exhibit-72 is filed by the Judgement Debtor and that is rejected while rejecting petitioner’s application Exhibit-60.

6. After perusing the applications and the orders passed thereon, in my view, considering the mandate of Order XXI, Rule 35 of Code of Civil Procedure, it was incumbent upon the Court below to have assisted the petitioners to execute the decree for possession/permanent injunction pertaining to the suit property by removing all such obstacles and obstructions thereto. If the respondents application is also dismissed, then it is clear that the decree is executable and enforceable. In that view of the matter, rejection of petitioner’s application (Exhibit-60) by holding that second Possession Warrant cannot be issued, is ex-facie erroneous. The order passed suffers from a clear error apparent on the face of record. Unless fresh encroachment is removed by seeking assistance of Executing Court the Decree cannot be executed.

7. In the light of the above, Rule is made absolute to the extent that order passed by the Trial Court on Exhibit-60 dated 10th January 2005 is set aside. The order dismissing application Exhibit-72 is maintained.

8. Respondents 1c and 1d who are on the suit land presently, are directed to remove themselves within a period of 72 hours from the date of receipt of a copy of this order, failing which it would be open for the petitioner to move the Executing Court and the Executing Court thereafter shall proceed to execute the order passed in accordance with law. However, while the Executing Court enforces the decree in favour of petitioner, the petitioner should ensure that the utensils and articles belonging to the respondents 1c and 1d are listed out and thereafter hand over to them.

(S.C.DHARMADHIKARI, J.)